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The Evolving Standards in Prison Condition Cases: An Analysis of *Wilson v. Seiter* and the Cruel and Unusual Punishment Clause

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THE EVOLVING STANDARDS IN PRISON CONDITION CASES: AN ANALYSIS OF *WILSON v. SEITER* AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

I. INTRODUCTION

For nearly two centuries, United States courts failed to recognize that the Constitution and the Bill of Rights could secure some rights for the incarcerated. Generally, the courts based their refusal to hear prisoner complaints on one or more of five rationales: the separation of powers doctrine, the low level of judicial expertise in penology, the fear that opening the courthouse doors to prisoners would result in a deluge of inmate litigation, and the view that federalism and comity should preclude considerations of the claims of state prisoners by federal courts.[1] It was not until the late 1960s and early 1970s that courts began to focus attention on the idea that prisoners might retain legal and constitutional rights while serving jail time.[2] In a 1974 decision, the United States Supreme Court began to accept the developing concept of prison rights, stating, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[3]

The general basis for a prisoner's claim of deprivation of constitutional rights became 42 U.S.C. § 1983, the federal civil rights statute governing the deprivation of constitutional rights under the color of state law.[4] Under § 1983, an individual must show that a

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[1] Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline in the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 797–98 (1977).

[2] *See* Angel Castillo, *The Legal Rights of Inmates*, N.Y. TIMES, Feb. 25, 1991, at A18.

[3] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974). The *Wolff* court, however, also recognized that prisoners' rights are subject to some restrictions because of the nature of confinement. *Id.* at 556.

[4] The relevant provision of § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983 (Supp. 1991). Although § 1983 was enacted by Congress in 1871, this section lay dormant until 1961, when the Supreme Court held that § 1983 extended to government officials acting under color of state law, and that public officials may be liable for Fourteenth Amendment violations. *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

right protected by the Constitution has been violated and that the deprivation or violation was effected under the "color of state law."[5] Although prisoners may allege deprivations of the First, Fifth, Eighth or Fourteenth Amendments, the Eighth Amendment has been the most frequent basis for prisoners' civil rights actions.[6]

Lawsuits involving the conditions of a particular prisoner's confinement are raised under the Eighth Amendment's Cruel and Unusual Punishment Clause. Although the Supreme Court first applied the Cruel and Unusual Punishment Clause only to deprivations specifically imposed as part of the prison sentence, the Court acknowledged in 1976 that this constitutional provision could also be applied to some deprivations that were suffered *during* imprisonment.[7] Today, the Eighth Amendment is recognized as proscribing far more than physically barbarous conditions and punishments; it prohibits any deprivation that may deny prisoners the minimal civilized measure of life's necessities.[8]

Since then, the Supreme Court has issued numerous decisions defining the precise scope of liability under § 1983. *See generally* Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982) (discussing the scope of § 1983 liability through an examination of the statutory language of § 1983, the history and policy of the statute, and case law).

[5] *See generally* HON. GEORGE C. PRATT ET AL., SECTION 1983 CIVIL RIGHTS LITIGATION 1985: DEVELOPMENTS, TRENDS, AND PROBLEMS 567–70 (1985) (discussing the "under color of law" requirement of § 1983).

[6] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *See generally* Robinson v. California, 370 U.S. 660 (1962).

[7] *See generally* Estelle v. Gamble, 429 U.S. 97 (1976).

[8] *See* Rhodes v. Chapman, 452 U.S. 337, 345–46 (1981). For historical information on the Cruel and Unusual Punishment Clause, *see generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969). The Framers of the Eighth Amendment sought, as its words suggest, to prevent judges and legislators from imposing on citizens barbarous or cruel and unusual forms of punishment. *Id.* Consequently, the Eighth Amendment has long been thought to prohibit such inhuman punishment as torture, lingering death, drawing and quartering, disemboweling, and burning at the stake. *See In re Kemmler*, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878). In recent years, the Supreme Court has interpreted the Cruel and Unusual Punishment Clause in a flexible and dynamic manner that reaches beyond the extreme physical punishments proscribed in early United States history. *See* Gregg v. Georgia, 428 U.S. 153, 171 (1976). Today, the Cruel and Unusual Punishment Clause prohibits punishments or prison conditions that, although not physically barbarous, "involve the unnecessary and wanton infliction of pain." *Id.* at 173. Not all prison conditions, however, trigger Eighth Amendment scrutiny. Only deprivations of the basic necessities of life – such as food, medical care, sanitation, and physical safety – violate the intent of Eighth Amendment protections. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991); Whitley v. Albers, 475 U.S. 312, 318–19 (1986); *Rhodes*, 452 U.S. at 347; Hutto v. Finney, 437 U.S. 678, 679 (1978).

In 1981, the Supreme Court directly addressed the problem of prison conditions for the first time in *Rhodes v. Chapman*.[9] The Court's decision, however, illustrated a tension among the Justices. The majority in *Rhodes* held that prison conditions must evidence "wanton and unnecessary infliction of pain" to qualify for relief under the Eighth Amendment, indicating that a subjective component of malice or irresponsibility may need to be proven by a prisoner.[10] In his concurrence, however, Justice Brennan reasoned that only an objective determination regarding the actual conditions of the prisoner's incarceration should resolve the case.[11] Thus, after *Rhodes*, the law remained unclear as to whether a successful prison condition claim under the Eighth Amendment was to turn on prison conditions themselves, the knowledge or intent of those responsible for administering the prison system, or both.[12]

In a 1991 case, *Wilson v. Seiter*, the Supreme Court attempted to resolve this uncertainty in the law.[13] *Wilson* involved an Ohio prison inmate's alleged claim that certain conditions of his confinement violated the Eighth and Fourteenth Amendments. In a five to four decision, the Supreme Court held that in order for a prisoner to prove that the conditions of confinement constituted cruel and unusual punishment, the prisoner must show "deliberate indifference" on the part of the officials toward prison conditions *as well as* the objective deprivation due to the condition or conditions present within the prison.[14]

Although a new and perhaps clearer test for evaluating Eighth Amendment prison condition claims was articulated in *Wilson*, the decision was closely divided and the majority's opinion left some questions unanswered. This Note critically examines the *Wilson* decision and forecasts its likely impact on Eighth Amendment prison condition cases in the future. Part II of the Note analyzes and discusses the majority and concurring opinions of *Wilson*. Part III examines lower court decisions concerning the conditions of

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[9] 452 U.S. at 337. Until this case, the Court had not heard an argument concerning whether the conditions of confinement at a particular prison constituted cruel and unusual punishment and had not addressed the principles relevant to assessing such claims.

[10] *Id.* at 346. *See infra* notes 34–39 and accompanying text (discussing further the Supreme Court's holding in *Rhodes v. Chapman*).

[11] *Id.* at 362–69 (Brennan, J., concurring).

[12] *See* James Rosenzweig, Comment, *State Prison Conditions and the Eighth Amendment: What Standard for Reform Under Section 1983?*, 1987 U. CHI. LEGAL F. 411, 412–20 (1987) (discussing the application and standards of *Rhodes*).

[13] 111 S. Ct. 2321.

[14] *Id.* at 2326–27.

confinement prior to *Wilson*, focusing in particular on the tensions in the lower courts surrounding the necessity of an intent requirement and the application of the totality of the conditions approach. Part IV critically discusses the impact of the *Wilson* decision and forecasts how the "deliberate indifference" requirement will be defined and applied by lower courts. This analysis concludes that, while the Supreme Court's decision in *Wilson* by no means precludes a jurisprudence of penal reform that is responsive to the many deprivations in the United States prison system, the ambiguity remaining after *Wilson* for the resolution of prison condition cases in lower courts virtually ensures that a uniform or coherent jurisprudence will remain for the present an elusive dream.

II. Objective Analysis of *Wilson v. Seiter*

A. *Case History*

Pearly L. Wilson, a prison inmate at Hocking Correctional Facility (HCF) in Nelsonville, Ohio, filed suit against the director of the Ohio Department of Rehabilitation and the warden of HCF under 42 U.S.C. § 1983. Wilson alleged that certain conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[15]

In support of his claim of cruel and unusual punishment, Wilson's complaint alleged overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate rest rooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.[16] In addition to describing the conditions in detail, Wilson's affidavits charged that the Ohio authorities, after notification, had failed to take remedial action.[17] Respondent's affidavits denied that some of the alleged conditions existed and described efforts by prison officials to improve other conditions.[18]

Both the Federal District Court in Ohio and the Court of Appeals for the Sixth Circuit focused on the prison officials'

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[15] *Id.* at 2322–23.
[16] *Id.* at 2323.
[17] *Id.*
[18] *Id.*

culpable states of mind when ruling on Wilson's claim.[19] In its decision, the district court granted summary judgment in favor of the prison officials because Wilson failed to prove obduracy and wantonness on behalf of the prison officials.[20] The Court of Appeals for the Sixth Circuit affirmed the district court's decision.[21] In so ruling, the court of appeals held that the officials' culpable states of mind should be gauged by whether the officials' behavior was "marked by persistent malicious cruelty."[22] Because Wilson had not shown that the conditions at the Ohio state prison were motivated by malice on the part of the prison officials toward inmates such as himself, the court of appeals affirmed the summary judgment in favor of the prison officials.[23]

B. *Majority Opinion*

The questions presented to the Supreme Court in the *Wilson* appeal involved whether a prisoner claiming that conditions of confinement constituted cruel and unusual punishment must show a culpable state of mind on the part of prison officials and, if so, what state of mind was required.[24] Three prior Supreme Court decisions illustrate how the *Wilson* majority answered these questions and arrived at its holding: *Estelle v. Gamble*,[25] *Rhodes v. Chapman*,[26] and *Whitley v. Albers*.[27] These prisoners' rights decisions construing the Eighth Amendment's Cruel and Unusual Punishment

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[19] Wilson, who was represented by the National Prison Project of the American Civil Liberties Union (ACLU), argued that officials' states of mind should be irrelevant in prison condition cases. *See* Ruth Marcus, *Court Raises Burden in Prison Lawsuits*, WASH. POST, June 18, 1991, at A4. The ACLU asserted that the conditions inmates must endure while in prison may be cruel and unusual regardless of whether they are spawned by malice, deliberate indifference, or neglect. *Id.* The United States Justice Department joined the ACLU in supporting Wilson's position, reasoning that the failure of the government to meet inmates' basic human needs constitutes cruel and unusual punishment whether or not fault could clearly be ascribed to the particular officials responsible for running the facility. *Id.*

[20] Wilson v. Seiter, 893 F.2d 861, 862–63 (6th Cir. 1990), *vacated*, 111 S. Ct. 2321 (1991).

[21] *Id.* at 867.

[22] *Id.* This standard for determining culpable state of mind followed the reasoning and measure of intent defined in Whitley v. Albers, 475 U.S. 312 (1986). *See infra* notes 40–43 and accompanying text (discussing the facts and holding in *Whitley*).

[23] *Wilson*, 893 F.2d at 867.

[24] 111 S. Ct. at 2322.

[25] *See generally* 429 U.S. 97 (1976).

[26] *See generally* 452 U.S. 337 (1981).

[27] *See generally* 475 U.S. 213 (1986).

Clause provided the framework for the majority's decision in *Wilson*.[28]

Estelle v. Gamble was the first case in which the Court recognized that the Eighth Amendment's Cruel and Unusual Punishment Clause could be applied to some conditions suffered during imprisonment.[29] The *Estelle* Court emphasized that only prison conditions incompatible with "evolving standards of decency that mark the progress of society," or that involve "the unnecessary and wanton infliction of pain" implicate the Eighth Amendment.[30] In *Estelle*, the Court rejected an inmate's claim that a prison doctor had inflicted cruel and unusual punishment by inadequately attending to his medical needs[31] because the inmate failed to establish that the prison doctor possessed a sufficiently culpable state of mind.[32] The Court held that a prisoner advancing such a claim must prove "deliberate indifference to serious medical needs" to establish the requisite culpable state of mind.[33] In any medical condition case brought by a prisoner after *Estelle*, an official's culpable state of mind had to be proven by a plaintiff under the standard of deliberate indifference.

In *Rhodes v. Chapman*, prison inmates contended that the lodging of two inmates in a single cell constituted cruel and unusual punishment.[34] Although cases prior to *Rhodes* clearly indicated that prison conditions were subject to Eighth Amendment scrutiny, the Court had not squarely been confronted with a challenge requiring it to articulate "the principles relevant to assessing claims that *conditions* of confinement violate the Eighth Amendment."[35] In *Rhodes*,

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[28] Justice Scalia, who authored the majority opinion in *Wilson v. Seiter*, was joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy and Souter.

[29] Prior to this decision, the Supreme Court had found only the Eighth Amendment applicable to deprivations that were specifically part of the sentence. *See, e.g.*, Gregg v. Georgia, 428 U.S. 152 (1976) (imposition of death penalty under Georgia statute not held to be cruel and unusual punishment).

[30] *Estelle*, 429 U.S. at 104–06. In determining that the Eighth Amendment prohibited wanton infliction of pain, *Estelle* relied on *Gregg*, 428 U.S. at 173, and Francis v. Resweber, 329 U.S. 459 (1947).

[31] The inmate in *Estelle* was examined by medical personnel on seventeen occasions during a three-month span as a result of an injury obtained while performing prison work. 429 U.S. at 99–101. He alleged that the failure to perform an X-ray or to use additional diagnostic techniques constituted cruel and unusual punishment. *Id.*

[32] *Id.* at 105–06.

[33] *Id.* at 104.

[34] 453 U.S. 337, 339–43 (1981).

[35] *Id.* at 345 (emphasis added).

the Court found that no "static test" could exist for courts to determine whether particular conditions of confinement were cruel and unusual, but reemphasized that these conditions must both involve "the wanton and unnecessary infliction of pain."[36] Thus, wanton and unnecessary infliction of pain became the one element certain to be implicated in all Eighth Amendment challenges to unwanted prison conditions.

In *Rhodes*, the majority rejected the inmate's claim, concluding that while the plaintiff may have proven that double celling inflicts pain, he did not sufficiently establish any "unnecessary and wanton infliction of pain."[37] Although the majority's opinion *suggested* that some kind of subjective element may need to be proven, it was unclear as to whether a showing of intent was essential and, if so, what type of intent must be proven. In his concurring opinion, however, Justice Brennan supported an interpretation of the Cruel and Unusual Punishment Clause in Eighth Amendment challenges that required only careful objective scrutiny of the conditions at issue and the application of realistic, humane standards.[38] The vagueness of the majority's opinion coupled with the clarity of Brennan's concurrence led to a division in the lower courts over the appropriate standard to use in Eighth Amendment prison condition cases.[39]

In *Whitley v. Albers*, an inmate was shot by a guard during an attempt to quell a prison disturbance.[40] The prisoner alleged that he had been subjected to cruel and unusual punishment.[41] As in *Estelle* and *Rhodes*, the *Whitley* Court emphasized that, after incarceration, "only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."[42] Stressing that prison officials often have to make quick, difficult decisions during prison disturbances, the Court held that whether unnecessary and wanton pain was inflicted in any particular instance ultimately turned on whether the force was applied in a good faith effort to maintain and restore discipline or

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[36] *Id.* at 346–47.

[37] *Id.* at 347–48.

[38] *Id.* at 364 (Brennan, J., concurring).

[39] *See infra* notes 69–92 and accompanying text (discussing the disagreement among lower courts surrounding the need for an intent requirement).

[40] 475 U.S. 312, 314–16 (1986).

[41] *Id.*

[42] *Id.* at 319.

"maliciously and sadistically for the very purpose of causing harm."[43] Thus, in cases involving force in prisons, an official's intent must be measured by the "malicious and sadistic" standard.

Based on the rulings in these prior prisoners' rights cases, it was evident that the Court had not settled whether proof of culpable state of mind would be necessary in *all* Eighth Amendment post-conviction cases. *Estelle* and *Whitley* did resolve the need to prove a culpable state of mind in medical cases and in cases involving actions of force by prison guards against inmates. However, when the Court faced the specific question of determining Eighth Amendment rights in prison condition cases in *Rhodes*, the Court's holding resulted in vague and unsettled standards. In *Wilson*, the majority opinion interpreted *Estelle*, *Rhodes*, and *Whitley* as establishing objective *and* subjective components for measuring prisoners' claims of cruel and unusual prison conditions. The objective component requires a plaintiff to demonstrate the seriousness of the deprivation—that the conditions to which the inmate was subjected deprived that inmate of basic human needs. The subjective component requires the plaintiff to present some evidence concerning the official's state of mind—that the official acted with some form of intent toward the conditions in the prison.

The *Wilson* Court held that the holdings in *Estelle*, *Rhodes*, and *Whitley*, and the Court's reliance on the statement "no wanton infliction of pain," made the prison official's state of mind pertinent in all Eighth Amendment prison condition cases.[44] Although the Court in *Wilson* concluded that the holding in *Rhodes* turned on the objective component of the plaintiff's claim, not the subjective component, it held that the later holding in *Whitley* had clarified that

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[43] *Id.* at 320–21. Deliberate indifference was not held to be an appropriate standard because it did not adequately capture the importance of ensuring the safety of prisoners and officials in the face of violence, and because these decisions must be made in haste, without the luxury of a second chance. *Id.*

[44] Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). The Supreme Court has defined "wanton" as follows:

> Wanton means reckless—without regard to the rights of others . . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man toward the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.

Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (citing Smith v. Wade, 461 U.S. 30 (1982)).

Rhodes had not eliminated the subjective component of Eighth Amendment claims.[45] The majority in *Wilson* stressed that *Whitley* unequivocally stated that obduracy and wantonness, not inadvertence or good faith error, characterize the conduct prohibited by the Eighth Amendment, whether such conduct occurs in "connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock."[46]

The majority in *Wilson* also rejected the inmate's argument that a distinction should be drawn between "short-term" conditions—in which a state of mind requirement would apply—and "continuing" or "systematic" conditions of confinement—where the official's state of mind would be irrelevant.[47] The plaintiff's basis for advancing this argument makes intuitive sense: long-term conditions are the kind of persistent conditions officials have notice of on a daily, weekly or even yearly basis. Because the officials were or should have been on notice, they have presumably intended to ignore the conditions. In rejecting this contention, the majority reasoned that the intent requirement articulated in *Estelle* and *Whitley* was not a matter of policy or predilection of the Court, but rather was mandated by the language of the Eighth Amendment itself, which prohibits only cruel and unusual *punishment*.[48] Although the Court did acknowledge that "continuous" and "systematic" conditions would likely make it easier to establish intent on the part of prison officials, the majority opinion found no logical reason why these types of conditions should entirely obviate the requirement of intent.[49]

Having determined that the Eighth Amendment did require an inquiry into the state of mind of prison officials, the Court sought to establish what exact state of mind must be shown in order to

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[45] *Wilson*, 111 S. Ct. at 2324.

[46] *Id.* (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)).

[47] 111 S. Ct. at 2325.

[48] *Id.* at 2325–26. In discussing the significance behind this clause and the word "punishment", the Court quoted Judge Posner:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidently stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word [punishment], whether we consult the usage of 1791, or 1868 or 1985.

Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). *See also* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) ("The thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose . . . ."), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973).

[49] *Wilson*, 111 S. Ct. at 2325.

satisfy a plaintiff's burden of proof in cases challenging prison conditions. Although the Court found that precedent mandated that the offending conduct must fairly be characterized as "wanton," *Whitley* made it clear that wantonness does not have a fixed meaning.[50] The Court further found that the state of mind prescribed by the appeals court in *Wilson v. Seiter* and the Supreme Court in *Whitley*—that an official's actions must be undertaken maliciously and sadistically for the very purpose of causing harm—could not apply to prison condition cases. The malicious state of mind required under the *Whitley* standard would be too demanding for cases involving only the conditions of confinement.[51] A prison official's reaction to prison conditions, unlike prison disturbances, does not require the officials to make quick and difficult decisions during dangerous or heated situations.

Finding the *Whitley* standard of intent inappropriate in prison condition cases, the Court held that the "deliberate indifference" standard articulated in *Estelle* would be a more suitable standard.[52] In arriving at this decision, the Court postulated that, unlike cases in which prisoners allege specific malicious conduct toward them on the part of prison officials, there is "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'"[53] After *Wilson*, conditions of confinement violate the Cruel and Unusual Punishment Clause of the Eighth Amendment only if they involve a serious deprivation of basic necessities and result from an official's deliberate indifference.

C. *Concurring Opinion*

Although the four concurring Justices[54] agreed that the standard of malicious intent was too high in prison condition cases, they did not agree with either the majority's analysis of precedent or with the standards the majority set in its holding. The concurrence held that the majority's intent requirement was inconsistent with

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[50] *Id.* at 2326 (citing *Whitley*, 475 U.S. at 318, for the proposition that wantonness does not have a fixed meaning, but must be "determined with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged").

[51] *Wilson*, 111 S. Ct. at 2326.

[52] *Id.*

[53] *Id.* The Court then remanded the case to be decided under the standards it had established. *Id.* at 2328.

[54] Justice White, who authored the concurring opinion, was joined by Justices Marshall, Blackmun and Stevens.

prior Supreme Court decisions and that only the objective severity of the contested conditions of confinement should be evaluated when determining whether a particular condition of confinement is cruel and unusual.[55] These Justices felt that the majority's decision would result in serious deprivations of basic human needs—needs that would likely go unredressed due to "an unnecessary and meaningless search for 'deliberate indifference.'"[56] The concurrence disagreed with the majority's argument that "[i]f the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as a violation of the Eighth Amendment]."[57] The concurrence argued that the majority's reasoning departed from the Supreme Court's prior decisions in this area in which "[the Court] has made it clear that the conditions are themselves *part of the punishment.*"[58]

In support of its argument, the concurrence relied on prior Supreme Court decisions based specifically on challenges to conditions of confinement: *Hutto v. Finney*[59] and *Rhodes v. Chapman.*[60] *Hutto v. Finney* involved a district court's remedial order to limit the punitive isolation of inmates to thirty days. The lower court found that the conditions of a more lengthy confinement in isolation cells violated the Eighth Amendment.[61] In upholding the lower court's limitation on punitive isolation, the Supreme Court focused only on the *objective* conditions of confinement, holding that the lower court was correct to conclude that the conditions of lengthy detention in isolation cells violated prohibitions against cruel and unusual punishment.[62]

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[55] *See Wilson*, 111 S. Ct. at 2328–31 (White, J., concurring).

[56] *Id.* at 2331.

[57] *Id.* at 2328.

[58] *Id.*

[59] *See generally* 437 U.S. 678 (1978).

[60] *See generally* 452 U.S. 337 (1981).

[61] *Hutto*, 437 U.S. at 682–84. In *Hutto*, confinement in punitive isolation was for an indeterminate period of time. *Id.* at 683. An average of four, though sometimes as many as ten or eleven, prisoners were crowded into a windowless eight by eleven foot cell containing no furniture other than a source of water and a toilet that could only be flushed outside the cell. *Id.* Prisoners received mattresses at night which often contained infectious diseases. *Id.* Their meals consisted primarily of a four-inch square of "gruel," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. *Id.*

[62] *Id.* at 685–88. The Court failed to set any standard for determining when prison conditions were cruel and unusual. *Id.* It was unnecessary for the Court to do so because the prison officials admitted the conditions were cruel and unusual and because the officials challenged only the thirty day limit. *Id.*

The concurrence also relied upon *Rhodes*, but it disagreed with the majority's interpretation. The concurrence agreed that the Eighth Amendment prohibits only punishments that involve "unnecessary and wanton infliction of pain."[63] However, the concurrence argued that *Rhodes* required Eighth Amendment prison condition challenges to be treated as challenges to punishments that are formally meted out by statute or by a sentencing judge.[64] That is, courts are to examine only the objective severity of the plaintiff's situation, not the subjective intent of the officials who placed the plaintiff in that situation.[65] In addition, the concurrence felt that *Whitley* better supported an objective standard for challenges to conditions of confinement than a standard requiring the showing of a culpable state of mind. To support this reasoning, the concurrence pointed to parts of the *Whitley* opinion that the majority had overlooked when writing its opinion. In *Whitley*, the Court stated that "an express intent to inflict unnecessary pain is not required," and that harsh conditions of confinement may constitute cruel and unusual punishment unless such conditions are part of the penalty that criminals must pay for their offenses against society.[66] The concurrence felt that these selections from the *Whitley* decision supported the conclusion that intent should not be a requirement in prison condition cases.

The concurrence also indicated that the majority's intent requirement would be difficult or impossible to apply in cases where inhumane prison conditions were the result of "cumulative action and inaction by numerous officials inside and outside a prison, sometimes over a long period of time."[67] Under these situations, it would be unclear as to whose intent should be examined—the prison guards, the administration, prison officials or legislatures that provide funding to prisons.[68]

Based on these arguments, the concurrence reasoned that only the objective deprivations and conditions in a prison need be

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[63] Wilson v. Seiter, 111 S. Ct. 2321, 2329 (1991) (White, J., concurring).

[64] *Id.* at 2329–30.

[65] *Id.*

[66] 475 U.S. 312, 319 (1986). The concurrence in *Wilson* classified the language that the *Wilson* majority relied upon in *Whitley* as dicta. *Wilson*, 111 S. Ct. at 2320 (White, J., concurring).

[67] *Wilson*, 111 S. Ct. at 2330 (White, J., concurring).

[68] *Id.* The concurrence was disturbed by the fact that the majority left § 1983 claims open to the possibility that officials could defeat a claim by showing that the conditions were caused by insufficient funding. *Id.* at 2330–31. *See infra* notes 170–188 and accompanying text (discussing the "cost defense" and its impact on prison condition cases).

analyzed to determine whether conditions within a prison are in violation of the Cruel and Unusual Punishment Clause. Regardless of whether the concurrence's interpretation follows more naturally from the Court's prior holdings in the area of prison conditions, it is the majority's opinion that sets the standards for further cases. Before discussing the likely ramifications of the *Wilson* doctrine in future cases, it is useful to consider disagreements present in lower courts prior to *Wilson* in order to gain a more thorough understanding of what was at stake in the resolution of *Wilson v. Seiter.*

III. Lower Court Interpretations of the Cruel and Unusual Punishment Clause

A. *Objective Severity versus the Need to Establish Intent*

Before the *Wilson* decision, no uniform interpretation of the application of the Eighth Amendment's Cruel and Unusual Punishment Clause existed among the lower courts in prison condition cases. Lower courts disagreed as to whether an intent requirement was necessary and, if so, how the intent requirement was to be defined. Some circuit courts held that only objective standards required examination,[69] while others placed weight on the intent of the officials in addition to the objective severity of the conditions.[70]

Prior to the Supreme Court's holding in *Wilson,* the Sixth Circuit had held that an official's intent must be examined in Eighth Amendment prison condition claims.[71] In *Birrell v. Brown,* the court held that, in addition to producing evidence of seriously inadequate

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[69] *See, e.g.,* Tillery v. Owens, 907 F.2d 418, 427–38 (3rd Cir. 1990) (finding a determination of the conditions was all that was necessary in Eighth Amendment prison condition cases), *cert. denied,* 112 S. Ct. 242 (1991); Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (finding the Supreme Court has not made intent an element of cases alleging unconstitutional prison conditions); Foulds v. Corley, 833 F.2d 52, 54–55 (5th Cir. 1987) (prison condition cases do not require a showing that officials acted with malicious or sadistic intent); French v. Owens, 777 F.2d 1250, 1252–53 (7th Cir. 1985), *cert. denied,* 479 U.S. 817 (1986).

[70] *See, e.g.,* Wilson v. Seiter, 893 F.2d 861, 867 (6th. Cir. 1990) (holding prisoners must prove official's behavior was "marked by persistent malicious cruelty"), *vacated,* 111 S. Ct. 2321 (1991); Birrell v. Brown, 867 F.2d 956, 958 (6th Cir. 1989) (holding prisoners must establish that inadequate conditions are the result of recklessness by the prison officials); Harris v. Maynard, 843 F.2d 414, 415–16 (10th Cir. 1988) (finding that wanton or obdurate disregard of, or deliberate indifference to, a prisoner's right to life as a condition of confinement must be established); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988) (holding prisoners must prove officials are deliberately indifferent to the health and safety of prisoners).

[71] *Birrell,* 867 F.2d at 957–59.

and indecent surroundings,[72] a prisoner must also establish that the conditions are "the result of recklessness by prison officials and not mere negligence or oversight."[73] It was the Sixth Circuit that originally heard *Wilson v. Seiter* on appeal.[74] In its decision, the Sixth Circuit went so far as to require the plaintiff to show that officials had acted "maliciously and sadistically" in imposing and neglecting the challenged conditions.[75] Although several other circuits recognized some form of intent requirement in prison condition cases, the Sixth Circuit was the only circuit to apply this demanding standard as a measure of an official's culpable state of mind.[76]

In addition, some circuits prior to *Wilson* required a showing of intent on the part of prison officials when conditions inside the prison threatened the health and safety of prisoners. In *Jackson v. State of Arizona*, a prisoner complained that the unsanitary handling of food and polluted water at the prison could lead to death and all types of diseases among the prison population.[77] In this case, the Ninth Circuit held that if the prison conditions were as threatening to the prisoner's health and safety as he alleged, and "if they were the result of *deliberate indifference* on the part of the prison official," then the prisoner had established conditions amounting to cruel and unusual punishment under the Eighth Amendment.[78] The Seventh Circuit followed a similar rationale.[79] In *Santiago v. Lane*, a prisoner suffered two brutal attacks at the hands of fellow inmates, and he alleged that these attacks were the result of officials' failures to take certain precautions to ensure the safety of prisoners.[80] The Seventh Circuit held that the prisoners must be able to prove that the prison officials were deliberately indifferent toward the safety of a prisoner in order to argue successfully that his Eighth Amendment rights were violated.[81] The court, relying upon an earlier case

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[72] *Id.* at 957. The prisoner's complaint described a facility in need of serious repairs. He alleged that the prison was an unsanitary and dangerous place to live, that the buildings were fire and asbestos hazards, that the roof leaked, that there was only one shower for forty-five prisoners, and that insects and vermin were present. *Id.*

[73] *Id.* at 958.

[74] Wilson v. Seiter, 893 F.2d 861 (6th Cir. 1990), *vacated*, 111 S. Ct. 2321 (1991).

[75] *Id.* at 866.

[76] *See* Martin A. Swartz, *The Decision on Prison Conditions*, 206 N.Y. L.J. 3 (1991).

[77] 885 F.2d 639, 640–41 (9th Cir. 1989).

[78] *Id.* at 641 (emphasis added). After determining that some of the claims could arguably amount to a violation of the Eighth Amendment, the court remanded the case. *Id.*

[79] *See generally* Santiago v. Lane, 894 F.2d 218 (7th Cir. 1990).

[80] *Id.* at 218–19.

[81] *Id.* at 220–21.

in the Seventh Circuit, held that the deliberate indifference standard articulated in *Estelle v. Gamble*[82] had been extended "to impose upon both federal and state correctional officers and officials the obligation to protect inmates from violence at the hands of other inmates."[83] These cases illustrate several circuits' applications and interpretations of the intent requirement in Eighth Amendment cases dealing with the many conditions found within the prison environment.

Other circuits, however, specifically stated or implied that *only* the deprivations within the prison were to be demonstrated in cases challenging existing prison conditions. In *Gillespie v. Crawford*, the Fifth Circuit recognized that the Supreme Court had held that only the "unnecessary and wanton infliction of pain" upon an inmate violates the Eighth Amendment.[84] In its decision, the Fifth Circuit held that the standard to determine whether pain suffered by an inmate was properly characterized as "unnecessary and wanton" depended upon the *kind of conduct* against which an Eighth Amendment objection was lodged.[85] The *Gillespie* court reasoned that conditions of confinement, as well as medical care and security measures, can involve "unnecessary and wanton infliction of pain."[86] The court held, however, that unlike conduct that does not purport to be imposed as punishment, as was the case in *Estelle* and *Whitley*, the Supreme Court "has not made intent an element of a cause of action alleging unconstitutional conditions of confinement."[87] Under the Fifth Circuit's interpretation of the Cruel and Unusual Punishment Clause, prison conditions could have violated the Eighth Amendment even if they were neither known to the officials nor imposed with a conscious desire to inflict pain or punishment.[88]

The Third Circuit, prior to *Wilson*, also based its decisions in prison condition cases on the objective conditions in prisons. In *Tillery v. Owen*, the court found that cruel and unusual punishment

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[82] *Id.* at 221 (citing Estelle v. Gamble, 429 U.S. 97 (1976) (holding deliberate indifference by prison officials to a prisoner's serious illness or injury constitutes cruel and unusual punishment)).

[83] *Santiago*, 894 F.2d at 221 (quoting Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir. 1988)).

[84] 833 F.2d 47, 50 (5th Cir. 1987) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[85] *Gillespie*, 833 F.2d at 49. In *Gillespie*, the prisoner alleged that inmates were unconstitutionally housed in crowded and unheated conditions. *Id.* at 48. In addition, the prisoner alleged that the cells had inadequate lighting and ventilation and that they were dirty and infested with insects. *Id.* at 50.

[86] *Id.*

[87] *Id.*

[88] *Id.*

was to be measured by "the evolving standards of decency that mark the progress of a maturing society," and that the Eighth Amendment is violated only where an inmate is deprived of a "minimal civilized measure of life's necessities."[89] The Third Circuit did not require a showing of intent to determine whether an inmate had been deprived of any basic need. Instead, the Third Circuit focused on the conditions themselves to provide the evidence needed to prove that an inmate's Eighth Amendment rights had been violated.[90]

In examining the disagreements among the lower courts, it is apparent that the courts generally agreed that conditions themselves must constitute serious deprivations to make out a claim of cruel and unusual punishment. The courts, however, did not agree on whether to require proof of intent. The decision in *Wilson* put to rest this division among the lower courts. Prisoners must now show a culpable state of mind on behalf of prison officials, measured by the standard of "deliberate indifference."[91]

B. *Totality of the Conditions Approach*

Another subject of disagreement among the lower courts prior to *Wilson* centered on the "totality of the conditions approach"—an analysis in which the courts examine the cumulative impact of conditions of incarceration to determine whether the conditions constitute cruel and unusual punishment.[92] Under this approach, if a court does not find that a specific condition constitutes a violation of the Eighth Amendment, it may instead find that several of the complained-of conditions, in the aggregate, result in the infliction of punishment which is cruel and unusual.[93]

The totality of the conditions approach was first developed in the lower federal courts.[94] The viability of this approach, however,

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[89] 907 F.2d 419, 426 (3d Cir. 1990), *cert. denied*, 112 S. Ct. 343 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 346–47 (1981)).

[90] *Tillery*, 907 F.2d at 435–39. *See infra* notes 137–143 and accompanying text.

[91] Wilson v. Seiter, 111 S. Ct. 2321 (1991).

[92] *See* Rhodes v. Chapman, 452 U.S. 337, 362–63 (1981) (Brennan, J., concurring).

[93] *See* Stacia E. Reynolds, Note, *Hanging in the Balance: Ninth Circuit Analysis of Cruel and Unusual Punishment Clause*, 21 WILLAMETTE L. REV., 306, 307–08 (1985). One alternative to the totality approach was for courts to examine each condition separately and determine if a specific deprivation of human needs was present in the prison as a result of that particular condition.

[94] The first totality analysis was undertaken in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd.*, 442 F.2d 304 (8th Cir. 1971). In *Holt*, prisoners contended that the overall conditions in the prison amounted to cruel and unusual punishment. *Id.* at 373. The court

was strengthened in the Supreme Court's holding in *Rhodes v. Chapman*. In the majority opinion, the Supreme Court noted that "conditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities."[95] Unfortunately, the Court did not address the intricacies of the totality of the conditions approach.[96] Instead, the majority simply interlaced its opinion with the indicia of a totality test, finding that no static test could be used to determine whether the conditions of confinement constitute cruel and unusual punishment.[97] Interestingly, Justice Brennan's concurrence stated that "[the Court] today adopts the totality-of-the-circumstances test."[98] By addressing the totality approach in this manner, the Court added considerable weight to the efficacy of this approach, but failed to tell the courts how or when to use it.

Although the Supreme Court indicated its support for the totality approach in *Rhodes*, a division existed among the lower courts concerning the acceptance and application of this approach.[99] Some courts examined the totality of the challenged conditions to determine whether the cumulative effect of the prison conditions

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held that "[t]he distinguishing aspects of Arkansas penitentiary life must be considered together." *Id.* All conditions "exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates." *Id.*

[95] *Rhodes*, 452 U.S. at 341. The majority maintained that the prison was a modern, well-equipped and well-staffed facility. Because the challenged condition of overcrowding in *Rhodes* did not deprive inmates of basic necessities, such as food, medical care, safety or sanitation, the totality of the conditions did not violate the Eighth Amendment. *Id.*

[96] *Id.* at 347. The Court did not rely on the totality approach, but instead weighed the cumulative conditions in the prison against the punishment and the unnecessary infliction of pain. *Id.* In contrast, Justice Brennan's concurring opinion outlined the intricacies of the totality approach. *See id.* at 362–64 (Brennan, J., concurring).

[97] *Id.* at 346. For further discussion on the intricacies of the totality approach, especially prior to *Rhodes*, *see* Deborah A. Montick, Comment, *Challenging Cruel and Unusual Conditions of Confinement: Refining the Totality of Conditions Approach*, 26 How. L.J. 227 (1982) (arguing courts must continue to employ the totality approach in order to review comprehensively the unconstitutional conditions affecting state prisons and to counter the neglect by state legislatures).

[98] *Rhodes*, 452 U.S. at 363 n.10 (Brennan, J., concurring).

[99] *See generally* Robert M. Lapinsky, Note, *Prison Conditions: The Eighth Amendment Standard of the Remedial Authority of Judges*, 57 GEO. WASH. L. REV. 1387 (1989) (discussing the D.C. Circuit's acceptance of the totality of the circumstances test); Charlene W. Christofiles, Note, *Schrader v. White: Fourth Circuit Rejects Totality Analysis for Cruel and Unusual Conditions of Confinement*, 43 WASH. & LEE L. REV. 701 (1986) (discussing the Fourth Circuit's rejection of the totality approach); Neil W. Head, Note, *Totality of the Circumstances Standard Applied to Prison Overcrowding*—Jackson v. Hendricks, 59 TEM. L.Q. 589 (1985) (discussing the Third Circuit's acceptance of the totality approach as the correct standard to determine whether conditions violate the Eighth Amendment); Reynolds, *supra* note 93 (arguing that the Ninth Circuit has rejected the totality approach).

amounted to an Eighth Amendment violation.[100] Other courts rejected the totality approach and instead focused on each of the challenged conditions separately.[101]

When ruling on a district court's application of the totality approach in *Inmates of Occoquan v. Barry*, the District of Columbia Circuit Court of Appeals affirmed the use of the totality of conditions test.[102] The D.C. Circuit was specific in defining what an inmate must show; it was the identification of deprivations, not deficiencies, that was essential in finding a constitutional violation under the totality of the conditions approach.[103] The Fifth Circuit also utilized and supported the totality approach.[104] In *Stewart v. Winter*, the court held "[t]he legal test for an Eighth Amendment challenge to conditions of one's confinement, although imprecise, is well settled: the court must consider the 'totality' of the conditions to determine whether they violate contemporary standards of decency."[105] In support of this proposition, the court cited *Rhodes* as adopting the totality test by implication.[106]

The Ninth Circuit, however, rejected the use of the totality approach. In *Hoptowit v. Ray*, the court heard allegations that

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[100] *See, e.g.*, Tillery v. Owens, 907 F.2d 418, 426–27 (3d Cir. 1990) (examined the totality of the conditions within the prison when determining whether conditions of confinement violated the Eighth Amendment), *cert. denied*, 112 S. Ct. 343 (1991); Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988) (finding the court must identify conditions which, either alone or taken together, violate the Eighth Amendment); Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (holding numerous deficient conditions, considered together, constitute a claim under § 1983); Stewart v. Winter, 669 F.2d 328, 335–37 (5th Cir. 1982) (finding the court must consider the "totality" of the conditions to determine whether an Eighth Amendment violation exists).

[101] *See, e.g.*, Schrader v. White, 761 F.2d 975 (4th Cir. 1985) (rejected use of totality approach and instead analyzed each factor separately); Smith v. Fairman, 690 F.2d 122, 125 (7th Cir. 1982) (rejected totality approach because "vague conclusions that totality of conditions amount to a constitutional violation are insufficient"), *cert. denied*, 461 U.S. 946 (1983); Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982) (applied single condition analysis and rejected totality approach).

[102] 884 F.2d 828, 839 (D.C. Cir. 1988).

[103] *Id.* at 839–40. The majority felt that deficiencies were merely conditions that fell short of the norm, and that they were not a violation of the Eighth Amendment. *Id.* In order to constitute a deprivation of constitutional rights, the conditions had to be more than undesirable or deficient; they had to amount to a complete denial of basic necessities. *Id.* Thus, deficiencies, even in combination, did not rise to the level of Eighth Amendment violations. However, deprivations, either alone or in combination, could rise to the level of Eighth Amendment violations. The dissent, however, argued that the term "deficiency" was simply "shorthand for constitutional violations of deprivations." *Id.* at 849 n.21 (Greene, J., dissenting).

[104] *See* Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982).

[105] *Id.*

[106] *Id.* at 335–36 n.17 (citing Rhodes v. Chapman, 452 U.S. 337, 345–46 (1981)).

conditions in isolation, segregation and protective custody cells in a Washington state prison constituted cruel and unusual punishment.[107] Whereas the district court concluded that any particular condition violated the Eighth Amendment solely because it contributed to the totality of the conditions, the appeals court specifically rejected the totality approach.[108] The court held that "there is not an Eighth Amendment violation if each of the basic needs is separately met."[109] Thus, in the Ninth Circuit prior to *Wilson v. Seiter*, courts had to consider each condition in the prison and determine whether the condition amounted to a deprivation in the areas mandated by the Eighth Amendment.[110] Without a deprivation of a basic human need, no totality of the conditions could result in a constitutional violation.[111]

Thus, prior to the Supreme Court's holdings in *Wilson v. Seiter*, lower courts both rejected and accepted the use of the totality approach. In *Wilson*, the Supreme Court addressed the prisoner's claim that a court cannot dismiss any single challenged condition because each condition must be "considered as part of the overall conditions challenged."[112] The majority in *Wilson*, however, concluded that *Rhodes v. Chapman* had not established the broad proposition that each condition must only be considered as part of the overall conditions challenged.[113] *Wilson* rejected the notion that "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.[114] Instead, the Court held that some conditions of confinement may establish an Eighth Amendment violation "in combination"

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[107] *Hoptowit*, 682 F.2d 1237, 1245 (9th Cir. 1982).

[108] *Id.* at 1246 (holding "courts may not find [Eighth Amendment] violations based on the 'totality of conditions' at a prison").

[109] *Id.* at 1246–47.

[110] *Id.* at 1247.

[111] The analysis applied in *Hoptowit* was later labeled as the "core conditions test" in David J. Gottlieb, *The Legacy of Wolfish and Chapman: Some Thoughts About "Big Prison Case" Litigation in the 1980s*, *in* PRISONERS AND THE LAW 2, 2–18 (Ira P. Robbins ed., 1990). Under the core conditions test, the Eighth Amendment is violated when a prisoner is deprived of at least one of the "core conditions" – adequate food, clothing, shelter, sanitation, medical care, and personal safety. *See* Russell W. Gray, Note, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U.L. REV. 1339, 1352–54 (1992).

[112] Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991). The prisoner based his argument on the Court's observation in *Rhodes v. Chapman* that conditions of confinement, alone or in combination, must be considered as part of the overall conditions challenged. *Id.* (citing *Rhodes*, 452 U.S. at 347).

[113] *Wilson*, 111 S. Ct. at 2327.

[114] *Id.*

when and "only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need."[115]

The Supreme Court has now established a new application of the totality of the conditions approach. The Court rejected the notion that conditions should always be analyzed in isolation, while at the same time limited that use of the totality approach. Contested conditions *can* be evaluated in combination, but only when deprivations of a "single, identifiable human need" can be illustrated.[116] Although the Court did clarify how to apply the totality approach, by actually limiting its use, the Court may be making the identification of deprivations which exist in prisons more difficult. However, the Court could have simply dismissed the notion of analyzing conditions in combination. If it had, prisoners would only have been able to analyze each condition separately and would have been faced with a stricter burden of proof. Because the Court did not completely dismiss this approach, it appears, as with its additional requirement of deliberate indifference, that the Court is defining new approaches which may be stricter, but which still allow inmates to raise Eighth Amendment claims.

A recent Fourth Circuit decision illustrates the impact of the "single, identifiable human need" requirement as set forth in *Wilson*.[117] In *Williams v. Griffin*, a prisoner alleged that his Eighth Amendment protection from cruel and unusual punishment had been violated as a result of prison overcrowding combined with unsanitary conditions.[118] The point of disagreement between the parties was whether or not the totality of conditions approach could combine to show an Eighth Amendment violation.[119] The court

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[115] *Id.* In its reasoning, the Court set forth "a low cell temperature at night in combination with a failure to issue blankets" as an example of when conditions could be evaluated "in combination." *Id.*

[116] *Id.* Interestingly, the concurrence did not mention the majority's interpretation of the totality test in its opinion. In addition, the "single, identifiable human need" requirement is arguably an adoption of the core conditions test. *See* Gray, *supra* note 111, at 1362–63.

[117] *See generally* Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991).

[118] *Id.* at 821. The prisoner alleged that the prison was unconstitutionally overcrowded, with twelve persons in a cell that measured approximately twenty feet by twenty feet and was designed to hold only four inmates. *Id.* In addition, his complaint alleged unsanitary conditions, including one toilet bowl for the twelve cell mates which was "constantly coated with urine day and night," four showers for approximately 96 inmates, and unsanitary and deficient plumbing systems which flooded floors with sewage. *Id.* at 821–22.

[119] *Id.* at 824. The prison officials contended that a totality of the circumstances approach could not be utilized to show an Eighth Amendment violation because a state's provision of basic necessities ends its obligation under the Eighth Amendment. *Id.* The prisoner alleged that serious overcrowding, when combined with other substandard conditions of confinement, unconstitutionally deprived an inmate of basic human needs. *Id.*

stated that many cases support the proposition that a totality of conditions can be combined to show an Eighth Amendment violation.[120] This court found, however, the *Wilson v. Seiter* had narrowed the totality of the conditions approach.[121] The *Williams* court applied the use of the totality approach as defined in *Wilson*, and held that the prisoner in this case must "demonstrate that the overcrowding, in light of overall prison conditions, deprived him of a specific human need."[122] *Williams* illustrates that the new totality approach derived from *Wilson v. Seiter* will be one prisoners can overcome, so long as an identifiable human need is being deprived.

Wilson clarified both the unresolved division over the need for an intent requirement and the application of the totality approach for the lower courts. How the decision in *Wilson* will affect prison condition cases in the future and how courts will apply the new standard of deliberate indifference is not as clearly defined.

IV. Critical Analysis of *Wilson v. Seiter*

Although *Wilson* may have clarified the legal test to be applied in prison condition claims of cruel and unusual punishment, the question remains whether deliberate indifference will be an effective and fair standard in its application.

A. *Judicial Intervention Within the Prison System*

One potential problem presented by the Court's holding in *Wilson* is whether prisoners will be able to obtain relief when inhumane conditions exist in correctional institutions. Over the past twenty years, courts have taken a more active role in structuring remedies for prison condition cases.[123] Forty-one states, the District of Columbia, Puerto Rico, and the Virgin Islands currently have prisons or their entire prison systems operating under a court order

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[120] *Id.* at 824 (cases omitted).

[121] *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321 (1991) (holding conditions of confinement can only be combined when resulting in the deprivation of a single, identifiable human need)).

[122] *Williams*, 952 F.2d at 824–25. The Fourth Circuit found that the allegations in the prisoner's complaint did raise a genuine issue with respect to unsanitary conditions and overcrowding. *Id.* at 825. *Williams v. Griffin* did not, however, define exactly what would constitute a specific human need. *See also* Gray, *supra* note 111, at 1384–86 (discussing the types of human needs the courts may or may not recognize).

[123] Traditionally, courts were reluctant to intervene in the administration of state prisons. *See supra* notes 1–6 and accompanying text.

or consent decree designed to help regulate and correct the conditions of those prisons.[124] The *Wilson* decision may result in a decrease in this type of judicial activism.

On the one hand, many argue that judicial intervention in state and federal prison systems has been a positive development. The need for judicial intervention may not be immediately apparent, but several important factors put prisoners at a distinct disadvantage in fighting for their rights and in obtaining support for prison reform. First, public apathy contributes to the pervasive neglect of prisons in the United States. Often, the public is not even made aware of prison conditions, and if it is, the public frequently lacks the desire to correct these conditions.[125] Not only are prison inmates politically unpopular and socially threatening, but prisoners are without the power to vote.[126] Most prisoners are also without the monetary funds needed to wage a political battle or to hire a private attorney. In addition, prisoners do not have regular access to phones, fax machines, xerox machines, legal resources, or lobbying assistance that they need to organize support for their cause. Furthermore, prison officials are often caught in the middle when state legislatures refuse to spend "sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards."[127] Conditions may need to be improved, but money may not always be allocated to correct them. In fact, some prison administrators have admitted that they do not like the present conditions in their prisons and that they actually welcome law suits which may force the state to put more money into making prison life more humane.[128]

Because prisoners are unable to fight for their rights on their own, and because officials' hands are often tied, a limited amount

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[124] *See* Lynn S. Branham, *When are Prison Conditions Cruel and Unusual?*, PREV. OF U.S. S. CT. CASES, Feb. 19, 1991, at 201.

[125] *See* Rhodes v. Chapman, 452 U.S. 337, 358 (1981) (Brennan, J., concurring).

[126] *See id.* at 358–59 (citing Morris, *The Snail's Pace of Prison Reform, in* PROCEEDINGS OF THE 100TH ANNUAL CONGRESS OF CORRECTIONS OF THE AMERICAN CORRECTIONAL ASSOCIATION 36, 42 (1970)).

[127] *See* Johnson v. Levine, 450 F. Supp. 648, 654 (D.C. Md. 1978). In *Johnson*, the court recognized that state legislatures are subjected to great pressures from many sides to allocate public funds for purposes which will benefit the tax-paying citizens of the state. 450 F. Supp. at 654. The court also found, however, that no matter how heinous the prisoners' crimes may have been, the prisoners are "human beings possessing rights recognized by the Constitution and by decisions of the Supreme Court." *Id.*

[128] *See* Stuart Taylor, *Locked Up in Jail, Locked Out of Court*, LEGAL TIMES, June 24, 1992, at 27.

of judicial intervention is arguably warranted in protecting the health and safety of prisoners. Federal courts need to remain available to prisoners who feel that their constitutional rights have been violated. Under these circumstances, courts arguably have emerged as a critical force behind efforts to ameliorate inhumane conditions, as they are insulated from political pressure and have a duty to enforce prisoners' minimal constitutional rights at a modest or at a significant financial cost.[129]

Some people, however, do not perceive judicial intervention in the area of prison reform to be a positive development. As explained in *Rhodes v. Chapman*, the Supreme Court itself does not want the judiciary to usurp the task of running prisons because the running of prisons should be entrusted to state legislatures and prison administrators, not to the courts.[130] Up until two decades ago, the judiciary did not play a significant role in prison reform. The courts followed the "hands-off" doctrine, leaving decisions and policy-making almost entirely up to legislatures and prison officials.[131] In general, those who do not support judicial intervention feel that prison decisions and the punishment of prisoners should be left to state legislatures and prison administrators, not to the courts that do not deal with prison issues on a day-to-day basis.[132] Still others who do not support judicial intervention feel that prisoners should not be afforded protection by the courts because they gave up their rights upon prosecution and because tax money should not be spent on prisoners who are no longer viewed as a productive part of society.

Although forceful arguments can be made both for and against judicial intervention in the prison reform process, courts have endeavored actively to correct unconstitutional violations in United States prisons since the late 1960s, and there is every indication that

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[129] *See generally* J.C.K., Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971) (discussing the abandonment of the hands-off doctrine in order to correct the problems of prison life).

[130] 452 U.S. 337, 354 (1981) (Brennan, J., concurring).

[131] The hands-off doctrine represents a denial of jurisdiction over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation suffered during imprisonment. *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (discussing and criticizing the hands-off doctrine prior to judicial activism within the court system).

[132] *Id.* at 508–09. Judicial review of administrative decisions can be seen as subverting the authority of prison officials, the discipline of the prisons, and the efforts of prison administrations to accomplish the objectives of the system which is entrusted to their care. *Id.*

they must continue to do so at some level.[133] Prison conditions are scandalous, with inmates frequently subjected to filth, overcrowding, and incessant violence.[134] Although the Constitution does not mandate comfortable prisons, the Supreme Court and lower courts have all recognized that inmates are to be afforded minimal decencies of life and basic human needs.[135]

In 1990, the Third Circuit reviewed a case illustrating just how desperate prison conditions can become in the United States.[136] In *Tillery v. Owens*, the court found that "most inmates spend 14 hours a day in their cells" and "some must spend 21 to 22 hours a day in their cells for as long as four consecutive weeks."[137] Because these cells are "so tiny, only one inmate at a time can stand in the cell; the other must lie on the bed."[138] Despite the small size of the cell and inadequate light for reading, twenty to twenty-five percent of the inmates were afraid to leave their cells because they feared physical assault.[139] Among many other things, "bed bugs and mice are epidemic," as are "mites, fleas and lice."[140] Conditions "are unsanitary and dangerous," "ventilation is grossly inadequate," and "plumbing is inadequate."[141] Finally, toilets in the affected cells "are unsuitable, resulting in the accumulation of human waste for as long as 2 days."[142]

Tillery presents a graphic picture of recent proof that courts must remain an important tool for the correction of unconstitu-

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[133] *See generally* Susan Strum, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990) (exploring the dynamics of judicial intervention in prison systems).

[134] *Prisons' Unusual, Unintended Cruelties*, CHI. TRIB., June 25, 1991, at C18. The population of United States prisons and jails has nearly doubled since 1980 to over one million inmates, giving this country the "world's highest rate of incarceration [which is] fast outpacing efforts to add new cells." Taylor, *supra* note 128.

[135] Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (citing Rhodes v. Chapman, 452 U.S. 337, 347–49 (1981)).

[136] *See* Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990), *cert. denied*, 112 S. Ct. 343 (1991) (holding the alleged conditions of confinement at the prison in question amounted to unconstitutional cruel and unusual punishment).

[137] *Id.* at 422.

[138] *Id.* Because of overcrowding, there was also "a shortage of basic supplies such as underwear, jackets, towels and bedding." *Id.* at 423. Inmates were forced to "borrow" these items from other inmates, paying for them with either usurious interest rates or sexual favors. *Id.*

[139] *Id.* at 422. Much of the insecurity was due to understaffing. Between 1984 and 1988, an average of 97 assaults were reported each year, but many more assaults and thefts went unreported. *Id.*

[140] *Id.* at 423.

[141] *Id.*

[142] *Id.*

tional deprivations which remain rooted within the United States prison system. It is arguable, however, that few claims will be successful if the definition of deliberate indifference is strictly construed by the lower courts. If the standard is not strictly construed, prison inmates may have a chance to continue fighting for conditions they believe may be cruel and unusual.

B. *Defining and Applying the Standard of Deliberate Indifference*

Deliberate indifference has rapidly become an established standard for evaluating officials' conduct in civil rights litigation. It has been employed in prisoner medical care cases,[143] municipal liability claims of inadequate training,[144] and for some due process claims.[145] Although *Wilson* expanded the deliberate indifference standard to include prison condition cases, it did not attempt to define deliberate indifference, leaving this up to the lower courts to work out on a case by case basis. For this reason, discrepancies will probably continue to exist among the lower courts. In addition, depending on the definition set by the lower courts, the deliberate indifference standard may also prove to be particularly harsh when actually applied in prison condition cases.

Past case law interpreting Eighth Amendment decisions illustrates the various definitions which may be applied among the lower courts. The possible interpretations courts may assign to deliberate indifference can be divided into four categories:[146]

1. Knowledge of harmful conditions and a failure to act on that knowledge;[147]

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[143] *See generally* Estelle v. Gamble, 429 U.S. 97 (1976).

[144] City of Canton, Ohio v. Harris, 109 S. Ct. 1197, 1204–05 (1989) (holding inadequate training of police may serve as a basis for § 1983 municipal liability only where failure to train police results in deliberate indifference to rights of people with whom the police come in contact).

[145] *See* 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES 121–29 (2d ed. 1991).

[146] Gray, *supra* note 111, at 1368–78 (assigning and discussing the four potential definitions of deliberate indifference).

[147] *See* Berry v. City of Muskogee, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (finding an official or municipality acts with deliberate indifference if the conduct or policy disregards known or obvious risks that are likely to result in the violation of prisoners' constitutional rights). Rather than calling for a strong showing of intent, this interpretation requires only a showing of actual knowledge of serious harm and subsequent failure to act on the harm. Gray, *supra* note 111, at 1368–69.

2. Inexcusable lack of knowledge;[148]
3. Recklessness;[149] or
4. Repeated negligent acts or systematic and gross deficiencies.[150]

As discussed earlier, the decision in *Wilson* clarified the analysis to be used in cruel and unusual punishment cases—both objective and subjective components must be proven. The Court's decision in *Wilson*, however, merely shifted the focus of the lower court debate to the actual definition of the standard now used to evaluate the intent of prison officials.

How the intent requirement of deliberate indifference is to affect prisoners' claims of cruel and unusual prison conditions will be determined by the exact definition applied by each lower court. Each of the four identified interpretations have different implications, and the precise definitions applied in the lower courts will affect the impact of the new intent requirement established in *Wilson*. If the courts assign a definition of criminal recklessness to deliberate indifference, a prisoner will have a much higher burden of proof. If a court holds out the definition to be that of systematic and gross deficiencies, however, the prisoner's burden in proving deliberate indifference will be lessened, as this definition does not specifically call into question the intent of the prison officials. In addition, if courts are to assign definitions which require an

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[148] Recklessness, as a definition, indicates that actual knowledge of a condition is not necessary to prove deliberate indifference. *See* Gray, *supra* note 111, at 1371–76. Actual knowledge may not be required in at least two situations. First, when officials purposefully shield themselves from knowledge of severe conditions, this purposeful shielding may be used to infer knowledge. *Id.* Second, an official's lack of knowledge of deprivations may be so offensive that it rises to the level of deliberate indifference. *Id.*

[149] *See, e.g.*, Santiago v. Lane, 894 F.2d 218, 221 (4th Cir. 1990) (holding a prisoner must prove that the official's action was deliberate or reckless in a criminal sense to show deliberate indifference); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984) (equating deliberate indifference with reckless disregard); Layne v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1982). Courts have used two major levels of recklessness to define deliberate indifference. Gray, *supra* note 111, at 1372–76. Some courts have concluded that conduct only reaches the level of deliberate indifference when it is criminally reckless. *Id.* at 1373–74. Other courts have interpreted deliberate indifference in Eighth Amendment cases to be closer to tortious recklessness. *Id.* at 1275–76.

[150] *See, e.g.*, Degidio v. Pung, 920 F.2d 525, 533 (11th Cir. 1990) (finding an official's deliberate indifference may be proven by evidence of repeated negligent acts of systematic deficiencies); Rogers v. Evans, 792 F.2d 1052, 1058–59 (11th Cir. 1986) (holding systematic deficiencies can provide the basis for a finding of deliberate indifference); French v. Owens, 777 F.2d 1250, 1254 (7th Cir. 1985) (finding deliberate indifference can be illustrated through repeated negligent acts or systematic deficiencies), *cert. denied*, 479 U.S. 817 (1986); Bishop v. Stoneman, 508 F.2d 1224, 1225–26 (2d Cir. 1974) (finding a series of incidents closely related in time may disclose a pattern of conduct by prison officials amounting to deliberate indifference to the medical needs of prison inmates).

inexcusable lack of knowledge, the prisoner may only have to prove deliberate indifference by demonstrating that the officials "should have known" about the conditions and acted upon them.

The most effective way to analyze the effect of the deliberate indifference standard on prisoner's claims of cruel and unusual punishment is to examine recent lower court decisions applying the standards set out in *Wilson*. By analyzing these cases, it will become clear whether the judiciary can continue to intervene and correct cruel and unusual prison conditions under the *Wilson* standard or whether the deliberate indifference standard is truly an unsurmountable obstacle to judicial reform.[151]

In cases subsequent to *Wilson*, the First Circuit has supported the stricter definition of deliberate indifference, that of criminal recklessness.[152] In *DesRosiers v. Moran*, the court held that deliberate indifference may be manifested by an official's response to an inmate's known needs, or by denial, delay, or interference.[153] The court went on to find that, while deliberate indifference can aptly be described as recklessness, "it is recklessness not in the tort-law sense but in the stricter criminal-law sense, requiring actual knowledge of impending harm, easily preventable."[154] Although this court's definition of deliberate indifference was discussed in the context of an alleged failure to provide adequate medical care, in light of the equation of "conditions of confinement" to medical conditions in the *Wilson* decision,[155] it is reasonable to assume that this definition of deliberate indifference from prison medical cases will carry over to prison condition cases in the First Circuit. In addition, in *McGill v. Duckworth*[156] and *James v. Milwaukee County*,[157] the Seventh Circuit also defined deliberate indifference as criminal recklessness.

In a recent Fourth Circuit case, deliberate indifference was not as strictly defined.[158] In *Williams v. Griffin*, the court held that the

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[151] This was one of the ultimate fears of the concurrence in *Wilson v. Seiter*: the concurrence felt that serious deprivations of basic human needs would go unredressed because of the search for deliberate indifference. 111 S. Ct. 2321, 2331 (1991) (White, J., concurring).

[152] *See* DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991).

[153] *Id.*

[154] *Id.*

[155] 111 S. Ct. at 2326 (finding no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement).

[156] 944 F.2d 334, 338 (7th Cir. 1991).

[157] 956 F.2d 696, 700 (7th Cir. 1992) (defining deliberate indifference as "recklessness in a criminal, subjective sense: disregarding a risk of danger so substantial that knowledge of the danger can be inferred").

[158] *See* Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991).

prisoner "must show that the Prison Officials had knowledge of the conditions that are the subject of the complaint."[159] In addition, the court held that "once prison officials become aware of a problem with prison conditions, they cannot simply ignore the problem, but should take corrective action when warranted."[160] This circuit is applying the definition requiring knowledge of a deprivation with a failure to act upon that knowledge. As a result of inspection reports documenting the inhumane conditions of confinement and the numerous other complaints by inmates, the court held that sufficient evidence was presented from which the inference of deliberate indifference could be drawn.[161]

The Fifth Circuit applied a similar definition of the deliberate indifference standard in *Alberti v. Texas*—deliberate indifference can be found "where prison officials were aware of objectively cruel conditions but failed to remedy them."[162] The Fifth Circuit, prior to *Wilson*, had held that intent was not an element of a cause of action alleging unconstitutional conditions of confinement.[163] In arriving at its definition of deliberate indifference after the *Wilson* decision, the Fifth Circuit found that the new deliberate indifference requirement of *Wilson* was not wholly separate from the objective requirement.[164] The Fifth Circuit then held that the prisoners satisfied the requirement of deliberate indifference because little doubt existed that both the county and the state knew that the conditions of confinement in the jails deprived the inmates of basic needs and because no discernable reason was presented for the prison officials' delays in correcting the conditions.[165]

These cases illustrate a division which continues among the lower courts. This time, the debate centers around the precise

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[159] *Id.* at 826. In this case, the prison officials contended that the prisoner failed to demonstrate the existence of a factual dispute with respect to the deliberate indifference of the officials. *Id.* The prisoner, however, insisted that once the officials were put on notice through several published reports by the Governor and Legislature of North Carolina regarding the deplorable conditions of the prison, they were required to make a reasonable response. *Id.*

[160] *Id.*

[161] *Id.* at 826–27. Thus, the summary judgment in favor of the prison officials was reversed and the case was remanded for further proceedings. *Id.*

[162] 937 F.2d 984, 998 (5th Cir. 1991). The prisoner complained of overcrowding and serious problems with the jail's plumbing, ventilation, fire, safety, supplies, food service, and medical care. *Id.* at 686–89.

[163] *See supra* notes 84–88 and accompanying text (discussing the Fifth Circuit's requirements prior to *Wilson*).

[164] *Alberti*, 937 F.2d at 998.

[165] *Id.* at 998–99.

definition of deliberate indifference, rather than the exact standard to measure Eighth Amendment claims. The effect of *Wilson* will, in part, be measured by the definitions each circuit assigns to deliberate indifference. Although the definitions will vary, the essential standard of deliberate indifference does not appear to be impossible for prisoners to satisfy. In both *Williams v. Griffin* and *Alberti v. Texas*, the prisoners were successful in illustrating that the officials had possibly acted with deliberate indifference.[166] In addition, Elizabeth Alexander, deputy director of the American Civil Liberties Union's National Prison Project, admitted that, while she was disappointed with the Court's ruling in *Wilson*, "the deliberate indifference standard is one we can live with."[167] Other lawyers representing prisoners have echoed this assessment, saying that although the deliberate indifference standard was a setback, it is one they will likely be able to meet.[168] Finally, those persons and groups representing prisoners were generally relieved that the Court did not instead choose the higher standard of intent set out in *Whitley v. Albers*. This standard would have required proof of "malicious and sadistic" behavior on the part of prison officials and would have been more difficult to prove than the standard of deliberate indifference.

Thus, although it may be more difficult to prove that conditions constitute cruel and unusual punishment with the addition of an intent requirement, it appears as though prisoners will still be able to successfully raise Eighth Amendment claims and courts will still be able to maintain constitutional requirements of basic human needs within the prison system. The "cost defense," however, is another possible barrier to cruel and unusual punishment claims.

C. *The "Cost Defense"*

With the establishment of the need to prove deliberate indifference, those concerned with how the *Wilson* decision will affect prison condition cases have also focused their attention on the role of the "cost defense" under the new standard. The *Wilson* court stated that "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the *official*."[169] Thus, it is possible that the state of mind requirement will prompt prison officials

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[166] *See supra* notes 158–161 and 162–165 and accompanying text.

[167] *See* Marcus, *supra* note 19.

[168] *See* Linda Greenehouse, *Justices Restrict Suits Challenging Prison Conditions*, N.Y. TIMES, June 18, 1991, at A1.

[169] Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991) (emphasis added).

to assert that fiscal constraints beyond their control, rather than their own personal *indifference*, acted as a constraint and prevented them from rectifying the inhumane conditions. Whether or not this defense is allowed to be raised will impact the outcome of prison condition cases after *Wilson*.[170]

Although the concurrence in *Wilson* was concerned about the effect of the cost defense, the majority was unimpressed. The majority stressed the importance of the intent requirement, and felt that the Court's decision to require a showing of intent could not be ignored or followed simply based on a policy consideration such as the cost defense.[171] Although the majority opinion mentioned the cost defense, it failed to address directly how this defense would affect an inmate's case as "the defendants failed to raise it [in this case]."[172] Apparently, the majority did not want this defense interfering with its opinion.

The concurrence felt that the majority's approach was "unwise" as it left open the possibility that prison officials will be able to defeat a § 1983 action by showing that the conditions were caused by insufficient funding rather than by any deliberate indifference on the part of the prison officials.[173] By leaving the legitimacy of this defense unanswered, the concurrence feared that the majority opinion would undermine the correction of serious deprivations of basic human needs in prisons.[174] Therefore, this issue was left unresolved, and the determination as to how to weigh the cost defense was left to the discretion of the lower courts.

Once again, there is no uniform agreement among the courts on this defense. The Sixth Circuit indicated in *Birrell v. Brown* that it would accept a defense by prison officials based on budgetary constraints.[175] In *Birrell*, the appellate court cited a Supreme Court case for the proposition that budgetary constraints could, in certain instances, cloak an individual with good-faith immunity.[176] The Sixth Circuit went on to say that such immunity based on budgetary

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[170] If this defense is raised successfully, the officials would be immune from any liability arising under a § 1983 claim.

[171] *Wilson*, 111 S. Ct. at 2326.

[172] *Id.*

[173] *Id.* at 2330–31 (Brennan, J., concurring).

[174] *Id.* at 2331.

[175] 897 F.2d 956, 958–59 (6th Cir. 1989). In *Birrell*, the prisoner alleged that the entire institution in which he was imprisoned was understaffed and overcrowded. *Id.* at 956–57.

[176] *Id.* at 959 (citing Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (indicating a professional, sued in his individual capacity, will not be liable for damages if he or she was unable to satisfy normal professional standards because of budgetary constraints)).

constraints could not excuse the constitutional violations themselves or foreclose a court from issuing orders requiring the government to correct the deficiencies.[177] Although the Sixth Circuit's application of the cost defense in *Birrell* indicated only a limited acceptance of the cost defense, the court stated that the prison official might somehow be directly responsible for the alleged deprivation, "but only if he was not *hampered by budgetary constraints*."[178] The court went on to find that the prisoner failed to allege that the prison official did anything other than the "best that he could do" with the money provided by the legislature, and that it appeared that the official was confronted with a situation over which he could not exercise as much control as might be desired due to lack of funds.[179]

Other courts have not been as receptive to the cost defense. The Ninth,[180] Eleventh,[181] and Seventh[182] Circuits have each found deliberate indifference over a defendant's claim of inadequate funding. In *Harris v. Thigpen*, the Eleventh Circuit recognized that systematic deficiencies in medical care may be related to a lack of funds allocated to prisons by the state legislature.[183] The court found, however, that such a lack of funds would not excuse a failure on the part of correctional systems to maintain a certain minimum level of medical services necessary to avoid the imposition of cruel and unusual punishment.[184] Although the *Harris* case dealt with medical care in prisons, the court's decision naturally extends to prison conditions cases as well. The intent standard in both types of cases is that of deliberate indifference, and both types of cases turn on the maintenance by prison authorities of conditions necessary to satisfy an inmate's basic needs.

A recent Fifth Circuit case decided after *Wilson* provides an example of the possible effect of the cost defense on prison condi-

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[177] *Birrell*, 867 F.2d at 958–99.

[178] *Id.* at 959–60 (emphasis added).

[179] *Id.* The court then held that the official was entitled to qualified immunity. *Id.* at 960.

[180] *See* Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding budgetary constraints do not justify cruel and unusual punishment).

[181] *See* Harris v. Thigpen, 941 F.2d 1495, 1509–10 (11th Cir. 1991) (finding a lack of funds will not excuse the failure of correctional systems to maintain a certain minimum level of medical services); Ancata v. Prison Health Serv. Inc., 769 F.2d 700, 705 (11th Cir. 1985) (finding a lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates).

[182] *See* Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (recognizing many prison deficiencies are related to a lack of funds, but finding a certain minimum level of medical service must be maintained to prevent cruel and unusual punishment).

[183] 941 F.2d at 1509.

[184] *Id.*

tion cases. Prior to *Wilson*, it was well established in the Fifth Circuit that constitutional standards may not be frustrated by legislative inaction or by failure to provide necessary funds.[185] In *Alberti v. Texas*, a case decided after *Wilson*, the Fifth Circuit briefly discussed the issue of whether inadequate funding could constitutionally excuse the perpetuation of otherwise invalid conditions of confinement.[186] Although the court did not directly address the defense because the record did not offer substantial evidence that the state's actions were constrained by funding, the Fifth Circuit did find that "the issue is assured currency by the intent requirement of *Seiter* and that opinion's leave of it."[187] The Fifth Circuit's interpretation of *Wilson* indicates that, although the defense would not be welcome in that circuit, the debate surrounding whether it is an acceptable defense is very much alive after *Wilson*.

The effect of the cost defense will depend on the weight it is given by the lower courts. When proving deliberate indifference, the cost defense could become a serious interference in those circuits that do allow this defense to be raised.

V. Conclusion

Is the deck stacked against § 1983 claims of cruel and unusual punishment? Prisoners must now show not only that conditions are so egregious as to violate the Constitution, but also that prison officials knew about the deprivations and did not make efforts to relieve them. The standards established by *Wilson v. Seiter* may set a clearer test for lower courts to follow when analyzing cruel and unusual punishment claims. Much uncertainty remains, however, to be worked out in the lower courts, including the definition of

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[185] *See, e.g.*, Smith v. Sullivan, 611 F.2d 1039, 1043–44 (5th Cir. 1980) (finding inadequate funding will not excuse the perpetration of unconstitutional conditions of confinement); Gates v. Collier, 501 F.2d 1291, 1319–20 (5th Cir. 1974) (same).

[186] 937 F.2d 984, 999–1000 (5th Cir. 1991).

[187] *Id.* at 1000. In addition, the *Alberti* court stated that the record in this case left it skeptical about the assertion that a recalcitrant legislature is the culprit. *Id.* This raises an issue that is beyond the scope of this Note—whether or not prisoners can base their cruel and unusual punishment claims on the collective culpability of all state officials, including the legislatures which vote to lock up more people while refusing to appropriate the money needed to avoid subjecting prisoners to inhumane or unconstitutional conditions. Although this claim may become a reality, two major barriers are present if this argument is to be successful. First, legislators must fit under the § 1983 "under the color of law" requirement. Second, it may be difficult to prove deliberate indifference on the part of state legislators because they will never be present to "see" or "know" whether money is needed to correct conditions.

deliberate indifference, the viability of the "cost defense," and the establishment of a "single, identifiable human need." The test established in *Wilson* may prove to be a workable standard if lower courts do not define deliberate indifference too strictly and if the cost defense is not a barrier. Only time will tell if the lower courts will interpret and apply *Wilson* so that inhumane conditions are not allowed to prevail over the claims of prisoners.

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